No. 22218

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant,

vs.

UNION BANK, a Corporation,

Appellee.

On Appeal From the United States District Court
for the Central District of California

BRIEF IN SUPPORT OF MOTION FOR REHEARING

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BRIEF OF APPELLANT IN SUPPORT OF PETITION FOR REHEARING

Pursuant to the provisions of Rule 40(a) of the Federal Rules of Appellate Procedure, the Equal Employment Opportunity Commission, appellant in this case respectfully requests that the Court grant its petition for rehearing on the decision issued in this case on October 1, 1968. The grounds upon which the Commission bases its request are as follows:

1. The holding of the Court to the effect that persons seeking relief from alleged acts of discrimination prohibited by Title VII of the Civil Rights Act of

1964 are obliged to seek relief from state agencies other than agencies having general jurisdiction in the area of unlawful employment practices is contrary to, (a) the intent of Congress as shown by the legislative history of Title VII; and, (b) the purposes and policies of Title VII as evidenced by relevant decisions of the Supreme Court and other Courts of Appeals handed down since the argument in this case.

2. Contrary to the holding of the Court the California Industrial Welfare Commission does not have clear jurisdiction over the charging party's claim that she was paid at a rate lower than that paid male employees performing the same work.

I.

The Court's decision is inconsistent with the intent of Congress as evidenced by the legislative history of Title VII, and is contrary to the purposes and policies of the Civil Rights Act of 1964.

A. The Legislative History of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e - §2000e-15 (1964) Demonstrates that Congress Intended to Limit Requirement of Prior Filing to Those State Commissions Administering Fair Employment Practice Laws Similar to Title VII.

As noted by the Court in its opinion, the requirement

of prior resort to a State or local agency was not part of the original civil rights bill as it passed the House of Representatives. On page 4 of the slip opinion, the Court refers to the remarks of Senator Dirksen at 110 Cong. Rec. 12807, 12814, and 12819 (1964), when the Senator was discussing the amendment to §706(b) incorporating this requirement. In explaining the effect of the amendment to §706(b) and (c), at 110 Cong.Rec. 12819, the Senator made the following comments:

> "(b) and (c): These sections providing [in the original House version] for conciliation and court enforcement 90 days after the Commission has determined that voluntary compliance cannot be obtained, and permitting the person aggrieved to bring a civil action in court with the permission of one member of the Commission if the Commission has failed to bring a court action, are substantially modified and are replaced by new subparagraphs (b), (c), (d), and (e) to take into account the many States which have State or local FEP laws.
>
> "New subsection (b) provides that where there is such a State or local law, no charge may be filed with the Commission until 60 days (120 days during the first year after the effective date of a new State or local law) after proceedings have been commenced under the State or local law. If any requirement for the commencement of such proceedings is imposed other than the filing of a written

and signed statement of facts on which the proceeding is based, the 60 days shall begin to run from the time such a statement is sent by registered mail to the appropriate State or local authorities." (emphasis supplied)

The further explanation of the prior resort requirement, quoted by the Court at pp. 4-5 of the slip opinion, if viewed in context makes it clear that the Senator considered the provision requiring prior resort to state agencies only in relation to state FEP legislation similar in scope to the proposed federal statute. During the same speech which contains the language quoted by the Court, Senator Dirksen stated:

"Frankly, at the very outset, in an examination of the entire civil rights package, I started with title VII. I did so because of its far-reaching character, for one thing. Second, a number of States have FEPC laws and have State-enforcing commissions. I thought if there were anything vulnerable in the bill, it would be title VII.

"When it comes to administration, I believe that we have done a reasonably good job on the substitute, hoping in every case that administration might be kept at the local level, because many cases are disposed of in a matter of days, and certainly not more

than a few weeks. In the case of California, FEPC cases are disposed in an average of about 5 days. In my own State it is approximately 14 days. "That will be the first point of contact when it comes to enforcement. It will be in the hands of the States. There are now 28 States which have FEPC acts containing enforcement provisions, and there are 3 additional States where enforcement is on a rather voluntary and conciliatory basis." 110 Cong. Rec. 13087 (1964) (emphasis supplied)

Senator Humphrey supplied a similar emphasis on State FEPC laws. For example, the paragraph immediately following that from which the Court quotes at 110 Cong. Rec. 13088 (1964) (See slip opinion, n. 5 at p. 5) reads as follows:

"We have provided that in the first year after enactment of the civil rights statute there will be no enforcement at all. We have provided, for States which do not now have fair employment practice laws, that there will be an additional 180 days before there is any impact of the law." 110 Cong. Rec. 13088 (1964). (emphasis supplied)

Finally, the remarks of Senator Case, as they appear at 110 Cong. Rec. 13081 (1964) and as quoted in footnote 5 of the Court's opinion, are in support of the remarks of Senator Clark immediately preceeding them. Senator Clark makes it crystal clear that the

Congress is referring only to State FEPC laws similar in scope to Title VII:

"The third reason why I say the bill is so important is that legislation is needed at the Federal level to enforce these rights. This contention was documented at great length in my speech of April 8. I pointed out then that it is true that in 28 States and some 48 cities there are fair employment practices laws or ordinances. Every State east of the Mississippi and north of the Ohio, except Maine and New Hampshire, has fair employment practice legislation.

* * *

"West Virginia, Kansas, Oklahoma, Colorado, and New Mexico also have such legislation. The three Pacific Coast States and Idaho and Nevada have fair employment practice legislation.

* * *

"The States which have the best FEPC laws--and I count my own State of Pennsylvania as one; I am proud of our law--are those which most articulately demand and request a Federal law to assist them. Five very able men testified before the Senate Committee on Manpower and Employment They are the men who administer the fair employment practice

laws in New York, New Jersey, Missouri, Minnesota, and California. Those five men were unanimous in their support of fair employment practices legislation at the Federal level.

* * *

"The Governors or the representatives of Governors of 15 States are also on record as supporting a Federal FEPC law." 110 Cong.Rec. 13080 (1964) (emphasis supplied.)

Other portions of the legislative history, not referred to by the Court, are equally persuasive for the proposition that Congress, in adopting the Leadership Compromise with respect to state and local laws, was only concerned with possible jurisdictional conflicts with State FEPC legislation, not State equal pay legislation. Moreover, a thorough review of "Legislative History of Title VII and XI of Civil Rights Act of 1964", GPO Catalogue No. Y3,EQ2; 2C49/2, has revealed no legislative history that explicitly supports the Court's conclusion. Indeed, prior resort to state or local equal pay laws was not even mentioned in the debate. This is hardly surprising since the Federal Equal Pay Act permits a woman to complain to the Federal authority without first attempting to have her complaint resolved by a state or local authority. The Congress is unlikely to have intended to impose a requirement under Title VII when the

Federal statute that deals solely with equal pay has no such requirement. The Court's decision, however, would create this discrepancy between the two Federal statutes.

Prior to the introduction of the Leadership Compromise, Senator Dirksen introduced several amendments, but reversed one dealing with the question of jurisdiction between the State and Federal legislation in the fair employment practices area. A reading of the Senator's comments in this regard demonstrates his exclusive concern with the preservation of State fair employment practice laws, and an absence of concern with State equal pay legislation:

> "I am withholding one amendment. It is probably more important than all the others. It deals with the procedure to be followed by an aggrieved person who feels that he has been the victim of discrimination in the employment field. This involves the question of jurisdiction, since 30 States today have enacted and put into practice their own code which deals with employment discrimination.
>
> "The 30 States to which I refer are:
>
> "Alaska and Arizona; California and Colorado; Connecticut and Delaware; Idaho and Illinois; Indiana and Iowa; Kansas and Massachusetts;

Michigan and Minnesota; Missouri and Nebraska; Nevada and New Jersey; New Mexico and New York; Ohio and Oregon; Pennsylvania and Rhode Island; Washington and West Virginia; and Vermont and Oklahoma." 110 Cong. Rec. 8193 (1964) 1/ (emphasis supplied).

Five states (Arkansas, Georgia, North Dakota, South Dakota and Texas) that have equal pay laws but no general FEP legislation are not included in Senator Dirksen's list of 30 states which have prior jurisdiction under the Senator's amendment.

The relationship between Title VII and State fair employment practice laws which concerned Senator Dirksen was also underscored by Senator Clark quoted above, as follows:

"Mr. President, title VII of the bill has received more study, discussion and debate than any other title in the bill. Title VII of the bill was neither conceived in haste nor written on the basis of speculation. Title VII, which relates to racial discrimination in employment, is based upon the accumulated experience of 25 States which have fair employment practices laws.

1/ Of the 30 States mentioned by Senator Dirksen, a recent review of State law by the Commission's staff indicates that, as late as 1968, 8 or almost 1/3 did not have State Equal Pay laws. This fact, of course, is a (continued)

* * *

"The Senator from Pennsylvania [Mr. Clark] was the chairman of the subcommittee that took testimony on the subject of fair employment practices. As I recall, that bill was reported by a hugh majority, and a majority that was arrived at after very careful study. Therefore, whenever Senators have studied the problem of fair employment practices, they have decided in favor of legislation in this area. 110 Cong. Rec. 13082 (1964). (emphasis supplied.)

As the foregoing makes clear, members of Congress consistently referred to Title VII as the FEP section of the Civil Rights Act of 1964, and used the same term when referring the kind of State legislation which required prior filing under §706(b).

1/ (continued)
virtually irrebutable indication that Senator Dirksen, as well as other members of Congress, did not consider equal pay legislation to be included in their references to State fair employment practice (FEP) legislation. The 8 States are: Delaware, Idaho, Iowa, Kansas, Minnesota, Nevada, New Mexico and Vermont.

2/ See, for example, the remarks of Representative Reid of New York during the House debate:

"One of the cornerstones of this bill is the FEPC title." 110 Cong. Rec. 1635 (1964).

B. The doctrine of "substantial relief" as explicated by the Court is contrary to the provisions of Title VII.

The Court's holding that because the California Division of Industrial Welfare had the authority to effect an adjustment of the charging party's wage rate "substantial relief" was available under state process, evidences a serious misconception about the nature of a proceeding under Title VII and the kind of relief available in such proceedings. The Court refused to accord any real weight to the allegations of the charge relating to "upgrading", i.e. promotional opportunity, and titles for female employees, which as shown by Miss Buckley's letter[3/] to the Commission bears on the "practices of the Bank toward women in the bank generally as well as my own problems with it...a check of the bank records would reveal salary discrepancies [between male and female employees] and further reveal that most women who have been promoted were on job for lengthier periods of time than were men who...received similar promotions." (emphasis supplied.) (See slip opinion p. 5 fn. 6). Giving no practical meaning to the fact that the charge plainly alleged a practice of discrimination against females as a class, the Court seems to have held that all that is really involved in a Title VII

3/ See Record page 34.

proceeding is whether the charging party has a grievance. This view of the statute ignores a salient principle of a Title VII proceeding, that Title VII discrimination is class discrimination by its very nature (See, Hall v. Werthan Bag, 251 F.Supp. 184, M.D. Tenn. (1966), and a private charging party has the right to maintain a class action (Oatis v. Crown Zellerbach, __F.2d__, C.A. 5, No. 25307, decided, July 16, 1968), bringing into issue not only his own grievance but the practice of discrimination from which the specific act of discrimination sprang,[4/] and obtain relief for all employees who are also subject to the discriminatory practice.

In this respect, as noted in the decision of the Supreme Court in Newman v. Piggie Park, __U.S.__, 88 S.Ct. 964 (1968) and the decision of the Fifth Circuit in Jenkins v. United Gas, supra, proceedings under the Civil Rights Act of 1964 are not litigation in the conventional sense. In a Title VII case the charging party "takes on the mantel of the sovereign." Jenkins, supra, slip opinion p. 8. "And the charge itself is something more than the

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4/ Even if the original charge had not specifically articulated the class nature of the complaint that would be of no consequence. See Jenkins v. United Gas, __F.2d__, C.A. 5, No. 24555, decided, Aug. 29, 1968, slip opinion, p. 3, fn. 3; King v. Georgia Power, D.C. N.D., Ga., Civil Action No. 11723, Aug. 13, 1968, 58 LC 6570, 6576.

single claim that a particular job [rate of pay] has been denied him [her]. Rather, it is necessarily a dual one: (1) a specific job, promotion, etc. has actually been denied, and (2) this was due to Title VII forbidden discrimination." Ibid. In light of this special factor present in Title VII the Court pointed out that the size of the specific charging party's own claim is not controlling. It may be "tiny", nonetheless, it is sufficient "to launch a full scale inquiry into the charged unlawful motivation in employment practices." supra, slip opinion p. 9. 5/ (A copy of the decision in Jenkins is attached for the convenience of the Court.)

There is no way to square the ruling of the Court in this case with the Supreme Court's decision in Newman v. Piggie Park, supra, and the Fifth Circuit decision in Jenkins, supra, for the decision here rests entirely on the assumption that individual relief which may flow from a proceeding before the California

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5/ The fact that these issues were presented to the court in a suit filed under Section 706 rather than in a demand proceeding as is the case here, does not alter the principle. The nature of a proceeding before the Commission is no different in terms of the public interest involved than a proceeding before the District Court. This was made plain in King v. Georgia Power, supra.

Industrial Welfare Commission would be "substantial" relief in a Title VII proceeding. And contrary to the view of the Court that general allegations of discrimination contained in the charge are not substantial, they are, in fact, the essence of the proceeding under Title VII.

It is literally impossible to overstate the importance of the principle that a Title VII proceeding is aimed at bringing an end to the practice of discrimination as well as the specific act of discrimination. Thus, as the Jenkins case shows, even if Miss Buckley's wages were adjusted, she would nonetheless be entitled to maintain an action under Title VII. Any other view of the Act compels the Commission and the courts to attack this cancer in our society employee by individual employee--and that just will not work. The contrary view of Title VII articulated by the Court in this case strikes a serious blow at the entire enforcement scheme of the Act--race cases, and those involving religion and national origin as well as sex. The decision will become a weapon in the hands of discriminators, who up to this point had not succeeded in narrowing the range of a Title VII proceeding, and thereby frustrating the carrying out of the public policy against discrimination, to which Congress had assigned the "highest priority." Newman v. Piggie Park, supra.

Moreover, even if wage discrepancies between male and female employees were the sole substantive issue in this case, the nature of the relief called for by the decisions in Newman v. Piggie Park, supra, and Jenkins, supra, is not available under the California law. The Industrial Welfare Commission is not authorized under California law to conduct "full scale inquiry" into alleged discrimination in pay based on sex in processing a single charge, nor does it appear to be empowered to grant relief to all female employees who may have been the victims of such discrimination by the Bank, as may be done under Title VII. (See Jenkins, supra, Oatis, supra, Newman v. Piggie Park, supra.) Thus, even under the standard of "substantial" relief set by the Court in this case, there was no requirement for prior resort to the Industrial Welfare Commission, since that Commission cannot provide "substantial" relief even on the issue of wages within the concept of relief embodied in Title VII.

II. The provisions of the California Labor Code, Section 1197.5 may not apply to attorneys

As the Court found, the Charging Party herein was employed "as an attorney in the Law Division of Appellee, Union Bank" at the time of the alleged unlawful employment practices. The "equal pay" provisions of the California Labor Code are part of comprehensive body of law regulating wages, hours and working conditions for minors and females. The California law provides for administration of this body of law by the Industrial Welfare Commission working through the Division of Industrial Welfare, Department of Industrial Relations. The Commission has the authority to issue orders and has issued a number of such orders, including orders of general application, in connection with its administration of the relevant sections of the California Labor Code. Among such general orders is a list of occupations generally exempt from the coverage of the Code, which may be read to include the "equal pay" provisions of the Code. Woemn employed in executive, administrative or professional capacities defined as females whose work is predominantly

intellectual, managerial or creative, requiring the use of independent judgment earning more than $450 per month are exempt, as are all females licensed or certified to practice any of the following professions: law, medicine, dentistry, architecture, engineering, teaching or accounting. (Bureau of National Affairs, State Laws Reporter, SLL 14:302, para. 2.020) Neither the Attorney-General of the State of California, nor the Industrial Welfare Commission has specifically ruled on the question of whether these exceptions apply to the equal pay provisions of the California Labor Code.

In view of the above, the Commission respectfully suggests that the Court may have erroneously concluded that there was, in fact, a state agency where "substantial relief against the alleged discrimination [was] available..." to the Charging Party. Therefore, there may have been no requirement that the Charging Party in this case file a claim with the California Division of Industrial Welfare prior to filing her charge with the Equal Employment Opportunity Commission.

Moreover, even if it turned out that the Commission has misinterpreted the laws of the State of California, we show

below that the Court's decision creates extremely difficult problems for charging parties under Title VII, which will have the undesirable effects of encouraging discriminators to refuse to comply with Title VII and open the doors of the courts to a period of litigation on procedural questions rather than on the merits of these disputes. The decision places two heavy burdens on persons who would file charges with the Commission in an effort to secure their federally guranteed right to be free from discrimination in employment. First, each charging party would be presumed to have knowledge of each and every local and state law or ordinance which might purport to regulate the dispute, including any exemptions or exclusions from the coverage of the local law. Second, even if each charging party had this information, he would then have to make a judgment concerning the substantiality of the relief available.

The consequences of ignorance of all potentially relevant state or local laws or an error in judgment on the part of the charging party is likely to be fatal to his obtaining his rights under Title VII. Should the charging party elect

to go to the state or local agency when it later turns out that prior resort to such agencies was not required, it is probable that the 90 days allowed under Section 706(d) of Title VII for the filing of charges in such cases (210 days is allowed in cases where prior resort to local agencies is required), a brief period at best, will have expired and the charging party will be barred from filing his complaint with the Commission. Cf. NLRB vs. Silver Bakery of Newton, 351 F.2d 37 (C.A. 1, 1964). On the other hand, should it later be determined, as the Court has in this case, that prior resort to the local agency was required, the 210-day period for the filing of charges allowed in such situations is quite likely to have expired, as it has in this case, and the charging party will be cut off from his federal rights, as would appear to be in this case. 6/

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6 / We do not mean to suggest that there are necessarily many agencies to which charging parties would have to bring their cases prior to filing charges with the EEOC. But some difficult problems can arise. North Dakota, for example, does not have a fair employment practice statute, but does have a labor relations law which prohibits the use of force or intimidation to prevent an employee from performing his work. (North Dakota Rev. Code, Section 34-0104). A Negro, who had been threatened by his supervisor and felt that he was being kept from his work because of his race, would face the question of (con't)

In sum, this decision places upon the charging party the duty to have a knowledge of state and local law not common among practicing attorneys. This result, the Commission respectfully suggests, is contrary to the purposes of Title VII. As the Fifth Circuit Court of Appeals has said recently in Jenkins v. United Gas Corp., supra,

> "...it is in keeping with the purposes of the Act to keep the procedures for initiating action simple."

6/ (continued)
whether he must first try to obtain relief under Dakota's labor law. Similarly, Section 47-2101 et seq. District of Columbia's Code, regulates the activities of employment agencies in the District. Section 703(b) of Title VII also regulates employment agencies. Should a Negro,believing he was denied referral because of his race, wished to file a charge against the employment agency, the decision of this Court places the prospective charging party in the position of having to decide whether to go first to the EEOC or to the District of Columbia Department of Licenses. The instant case itself also shows the difficulties confronted by charging parties under the decision in this case, for as we have seen, it is far from clear whether the California "equal pay" provisions cover the Charging Party herein. In the meantime, the alleged discriminator can argue the question either way.

A large number of charges that the Commission receives are filed by people unschooled in the technicalities of the law, and Title VII should not be administered by the Commission, or interpreted by the courts, to place obstacles in the paths of people who want to assert their rights. A person "should not have to take by-roads through the woods and follow winding trails through sharp thickets, in constant tension because of pitfalls and traps..." See Meredith v. Fair, 298 F.2d 696, 703 (C.A. 5, 1962).

Here, however, it seems that not only has the Commission been refused access to certain evidence relevant to a charge of unlawful discrimination, but, more importantly, the charging party appears to have been deprived of her rights to bring an action in the District Court. This result flows from the fact that the Court's holding that the charge in this case was not valid necessarily precludes not only the processing of the case by the Commission but also would appear to preclude a suit filed under Section 706(e). See Mickle v. Exide Battery. How many other persons in the State of California and throughout the country may be similarly deprived of the Federally guaranteed rights to obtain aid from the Commission and if that fails to bring suit is as yet unknown.

CONCLUSION

For all the reasons set forth above it is resepctfully requested that the Court grant the Commission's motion for rehearing, and such other relief as the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Motion to Extend Number of Pages, Motion for Rehearing and Brief in Support of Motion for Rehearing and for Oral Argument have this day been served by airmail, special delivery, certified, postage prepaid upon:

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Equal Employment Opportunity
Commission
Washington, D. C. 20506

This 12th day of October 1968.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24555

THOMAS L. JENKINS,

Appellant,

versus

UNITED GAS CORPORATION
and ALLAN B. CALDWELL,

Appellees.

Appeal from the United States District Court for the Eastern District of Texas

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(August 29, 1968)

Before BROWN, Chief Judge, BELL and THORNBERRY, Circuit Judges.

BROWN, Chief Judge: This case is another of those now frequently coming to us[1] under Title VII of the

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[1] *Overnite Transportation Co. v. Equal Employment Opportunity Commission*, 5 Cir., 1968, ——— F.2d ——— [No. 25521, July 5, 1968]; *Oatis v. Crown Zellerbach Corp.*, 5 Cir., 1968, ——— F.2d ——— [No. 25307, July 16, 1968].

Pending but yet undetermined before another panel are: No. 24789, *Hyler v. Reynolds Metal Co.*; No. 24810, *Dent &*

1964 Civil Rights Act, 42 U.S.C.A. §2000e, forbidding discrimination in employment by reason of race, color, religion, sex, or national origin. At issue is the question whether the offer and acceptance of a promotion, subsequent to the filing of a class action alleging systematic racial discrimination renders the suit moot as to the employee individually or to the class he represents. We hold that the action is not moot on either score and therefore reverse and remand for a full hearing.

The problem arises from the unique structure of Title VII which limits access to the courts by conditioning the filing of suit upon a previous administrative charge with the EEOC[2] whose function is to effectuate the Act's policy of voluntary conference, persuasion and conciliation as the principal tools of enforcement. The key to the courthouse door being the administrative charge, the door slams shut, the employer argued successfully below, when the specific job assignment claimed to have been denied the employee because of the employer's racial discrimination was offered to and accepted by the employee.

The Employee, Jenkins, is a Negro and was working for the Employer, United Gas Corporation, as a "serviceman's helper" at the time this action was com-

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Equal Employment Opportunity Comm. v. St. Louis-San Francisco Ry.; No. 24811, *Muldrow v. H. K. Porter Co.*; No. 24812, *Pearson v. Alabama By-Products Corp.*; No. 24813, *Pettway & Equal Employment Opportunity Comm. v. American Cast Iron Pipe Co.*

[2]Equal Employment Opportunity Commission.

But in keeping with the Act's short timetable EEOC gave notice (§706 (e); 42 U.S.C.A. §2000e-5 (e)) that due to heavy workload, efforts at conciliation had not been undertaken and Employee was notified of his right (§§706 (e), (f); 42 U.S.C.A. §§2000e-5 (e), (f)) to file suit in Federal District Court.

Employee, within the 30 days allowed, filed a class action alleging systematic racial discrimination which, tested against the applicable standard[4] of how a complaint is to be read under F.R.Civ.P. 12 (b) (6), was a model of specificity in plant-wide, system-wide racial discrimination which took its toll of Employee and his group principally in denial of promotion to the position of Serviceman.[5] The prayer was equally specific

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race (Negro) in that Caucasians have been transferred into the Service Department and promoted to Servicemen, while he and other Negroes remained Helpers, although qualified to be Servicemen.

SUMMARY OF INVESTIGATION

The investigation substantiates the Charging Party's allegation:

[Here follows factual detail]

DECISION

Reasonable cause exists to believe that the charge is true in that Respondent is discriminatorily refusing to promote the Charging Party and other qualified Negroes to the position of Serviceman."

[4]See, *Barber v. Motor Vessel "Blue Cat"*, 5 Cir., 1967, 372 F.2d 626, 627-28, 1967 A.M.C. 2337, ——; *Conley v. Gibson*, 1957, 355 U.S. 41, 45-48, 78 S.Ct. 99, —— - ——, 2 L.Ed.2d 80, 86-88.

[5]The complaint alleged:

"And plaintiff says that the defendants, and each of them, are denying him equality of opportunity in employment because of his race, in violation of Title VII of the Civil Rights Act of 1964 * * *.

B. Plaintiff further alleges, * * * that no Negroes are employed as Servicemen at any of the plants, of-

and broad, seeking an injunction on behalf of Employee and his class, not only as to promotion to Servicemen but generally prohibiting Employer "from continuing or maintaining the policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of plaintiff and others similarly situated to enjoy equal employment opportunity as secured by Title VII of the Act * * * without discrimination on the basis of race or color." It then ended with a prayer for back pay differential, and as a valuable unique adjunct of the Act (§706(k); 42 U.S.C.A. §2000e-5(k)) the allowance of attorney's fees.

But within a few weeks Employer offered the coveted promotion to Serviceman, which Employee ac-

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fices or service centers under the direct supervision and control of the defendant corporation, even though there are Negroes other than plaintiff who are qualified to hold such positions. And, in the alternative, plaintiff alleges that if there are other Negroes employed in such capacity by the defendant corporation, that such employment is on a token basis only; and plaintiff alleges that the defendant corporation is wilfully and intentionally denying to him, and other Negro employees similarly situated, equal employment opportunity in violation of Title VII of the Civil Rights Act of 1964.

C. Plaintiff was refused the promotion to Serviceman, * * * on the basis of his race and color pursuant to the defendant corporation's long standing and well-known practice, custom, and usage of refusing to promote Negroes to such positions because of their racial origin and classification. Pursuant to this policy practice, custom and usage, Negroes other than plaintiff have been denied promotion to such positions on the basis or race and color."

cepted one week later. Shortly, Employer moved to dismiss the action as moot since Employee was tendered and accepted promotion to Serviceman. Although the moving papers warranted the Judge to conclude that there was no dispute about the offer and acceptance of this individual promotion, the court without more — and without ever making any factual inquiry[6] into the broad charges affecting others system-wide — entered an outright judgment of dismissal.[7]

Neither on the score of the action in Employee's own right or his representation of those in his class will this outcome jell. Like considerations bear on each claim and they start with the unusual structure of Title VII. Of course the legislative compromise changed the concept from an enforcing-adjudicatory administrative agency to one in which the agency would conciliate, leaving the ultimate, final sanction to be judicial enforcement. As a part of the scheme such judicial enforcement was to be initiated by and

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[6]In fact, he excused Employer from answering interrogatories and refused to grant other motions of the Employee in his pretrial effort to ascertain the facts.

[7]Although the memorandum opinion referred to in the formal judgment spoke in terms of mootness, the judgment has all the earmarks of a binding adverse determination on the merits. It reads:

> "ORDERED, ADJUDGED, and DECREED by the Court that the above entitled and numbered cause be and the same is hereby dismissed at the cost of the Plaintiff."

Ironically, Employer on the ground that it was an F.R.Civ. P. 23 (b) (2) claim, not a 23 (b) (3) type, might even assert it as res judicata as to all members of the class. See F.R.Civ.P. 23 (c)(3).

at the hands of individual working grievants.[5]

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[5]For an excellent, well organized compilation of materials with helpful commentary that portrays legislative history in its technical sense and equally in the historian's broader view of men, times, places and action, see BNA, *The Civil Rights Act of 1964* (1964). The significant differences between the House Bill and that of the Senate (which was enacted) are set out, appendix C-1 at 289, 292-95, Dirksen explanation; C-2 at 297, 300-04, Humphrey explanation; and C-3 at 305, 311-16, comparative analysis by Congressman McCulloch. The commentary traces the largely unsuccessful efforts to eliminate such discrimination through Presidential Commissions and Executive Orders, the long legislative efforts over the years (at 9-22), and in chapter 6 discusses the evolvement of the Act's provisions for administration and enforcement (at 41-56) and summarizes those pertinent here along these lines. Section 706 (42 U.S.C.A. §2000e-5) provides that within 90 days of occurrence a written charge may be filed with EEOC either by a person claiming to be aggrieved, or by a member of EEOC who has reasonable cause to believe that an employer has engaged in an unlawful employment practice. EEOC then notifies the employer of the charge and conducts an investigation. Under §§709(a), 710(a), (42 U.S.C.A. §§2000e-8(a),-9(a)) EEOC in the investigation of such charges has the power to examine witnesses under oath and to require the production of evidence. If EEOC determines that there is reasonable cause to believe that the charge is true, it is then authorized to attempt to eliminate the practice by informal conference, conciliation, and persuasion. If EEOC is unable to secure voluntary compliance it then notifies the person aggrieved and a civil action may then be filed by the person claiming to be aggrieved, or if the charge was brought by a member of EEOC then by any person whom that charge alleges was aggrieved. In the employee's suit the court may appoint an attorney for the complainant and may authorize the prosecution of the suit without the payment of fees, costs, or security.

Except for the pattern or practice situation, (§707(a), 42 U.S.C.A. §2000e-6(a)), in which the Attorney General may institute suit and intervention by him by leave of the court on the Attorney General's certification that the case is of general public importance (either on his own or in response to recommendation of EEOC, (§705(g) (6), 42 U.S.C.A. §2000e-4(f) (6)), the suit is between private parties.

Although there are restrictions both in time and preconditions for court action this does not minimize the role of ostensibly private litigation in effectuating the congressional policies. To the contrary, this magnifies its importance while at the same time utilizing the powerful catalyst of conciliation through EEOC. The suit is therefore more than a private claim by the employee seeking the particular job which is at the bottom of the charge of unlawful discrimination filed with EEOC. When conciliation has failed — either outright or by reason of the expiration of the statutory timetable — that individual, often obscure, takes on the mantel of the sovereign. *Newman v. Piggie Park Enterprises,* 1968, ____ U.S. ____, 88 S.Ct. ____, 19 L.Ed.2d 1263; *Oatis v. Crown Zellerbach, supra.* And the charge itself is something more than the single claim that a particular job has been denied him. Rather it is necessarily a dual one: (1) a specific job, promotion, etc. has actually been denied, and (2) this was due to Title VII forbidden discrimination.

Considering that in this immediate field of labor relations what is small in principal is often large in principle,[9] element (2) has extreme importance with

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[9]In *United States Gypsum Co. v. United Steelworkers of America,* 5 Cir., 1967, 384 F.2d 38, 45-46, *cert. denied,* 1968, ____U.S. —, — S.Ct. ____, ____ L.Ed.2d ____ [36 U.S.L.W. 3287, U.S. Jan. 15, 1968], we had this to say:

> "Nationwide activity can grind to a halt over the question of who is to throw a switch. Problems which to the outsider seem petty are thought by the adversaries to be matters of great principle, if not principal."

See *Atlanta Terminal Company & Southern Ry. Co. v. System Federation No. 21, Railway Employes' Dep't., AFL-CIO,* 5 Cir., 1968, ____ F.2d ____ [No. 25354, June 25, 1968] affirming a

heavy overtones of public interest. Whether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated. Consequently, while we do not here hold that such a "private Attorney General"[10] is powerless absent court approval to dismiss his suit, see F.R.Civ.P. 41 (a) (2); the court, over the suitor's protest, may not do it for him without ever judicially resolving by appropriate means (summary judgment, trial, etc.) the controverted issue of employer unlawful discrimination.

In dollars Employee's claim for past due wages may be tiny. But before a Court as to which there is no jurisdictional minimum, (§706(f), 42 U.S.C.A. §2000e-5(f)), it is enough on which to launch a full scale inquiry into the charged unlawful motivation in employment practices. It is even more so considering the prayer for injunction as a protection against a repetition of such conduct in the future.

With so much riding on the claim of the private suitor, the possibility that in this David-Goliath confrontation economic pressures will be at work toward acceptance of preferred post-suit jobs and the equal possibility that an employer would devise such a re-

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District Court award of $12,000 in attorney fees on a recovery of $2,286.54 in damages. See also *Local No. 92, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO v. Norris*, 5 Cir., 1967, 383 F.2d 735.

[10] "If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park, supra,* ——— U.S. at ———, 88 S.Ct. at ———, 19 L.Ed.2d at 1265.

sist-and-withdraw tactic as a means of continuing its former ways calls for the trial court to keep consciously aware of time-tested principles particularly in the area of public law. Such actions in the face of litigation are equivocal in purpose, motive and permanence.[11]

The dismissal fares no better as to the class action. The Trial Judge's principal thesis on this score was "that no common question of fact exists as to all Negro employees of the defendant, since different circum-

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[11] "The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness concluson. * * * To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations. * * * [V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e., does not make the case moot.*" *United States v. W. T. Grant Co.*, 1953, 345 U.S. 629, 632-33, 73 S.Ct. 894, ——, 97 L.Ed. 1303, 1309-10 (Emphasis added.) (Footnotes omitted.); see *Gray v. Sanders*, 1963, 372 U.S. 368, 375-76, 83 S.Ct. 801, ——, 9 L.Ed.2d 821, 827.

And see *Cypress v. Newport News General & Nonsectarian Hosp. Ass'n.*, 4 Cir., 1967, 375 F.2d 648, 658 (en banc): "Such a last minute change of heart is suspect to say the least. We recently had occasion to observe in *Lankford v. Gelston*, 364 F.2d 197, 203 (4 Cir., 1966), under somewhat different circumstances, that 'protestations of repentence and reform timed to anticipate or to blunt the force of a lawsuit offer insufficient assurance' that the practice sought to be enjoined will not be repeated." And in a different context we phrased it this way. "What has been adopted can be repealed, and what has been repealed can be readopted. We conclude, therefore, that the plaintiffs are entitled to have their injunction against state action depriving them of their constitutional rights based on the record at the time the case was tried." *Anderson v. City of Albany*, 5 Cir., 1963, 321 F.2d 649, 657. *See Bailey v. Patterson*, 5 Cir., 1963, 323 F.2d 201, *cert. denied*, 1964, 376 U.S. 910, —— S.Ct. ——, —— L.Ed.2d——.

stances surround their different jobs and qualifications in the structure of the corporation."[12] To that Employer adds several more we find equally wanting. One is that there was no class since the other Negro apparently referred to in the administrative charge who was eligible for, but denied promotion to, Serviceman had likewise been promoted. There are at least two answers to that. First, this ignores element (2) of the claim—plant-wide system-wide racially discriminatory employment practices. Second, for the reasons pointed out at length Employee's personal claim is yet very much alive as to (a) back pay differential and (b) injunction protection against future repetition. The other supports urged by Employer are all wrapped up in its championing of *Mondy v. Crown Zellerbach Corp.*, E.D. La., 1967, 271 F.Supp. 258, which now falls before *Oatis v. Crown Zellerbach*, 5 Cir., 1968, ____ F. 2d ____ [No. 25307, July 16, 1968].

To *Oatis* we need only add a few comments. The holding that the nature of the claims asserted make it a 23 (b) (2)[13] class action was expressly recognized

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[12] *Jenkins v. United Gas Corp.*, E.D. Tex., 1966, 261 F.Supp. 262, 263-64.

[13] F.R.Civ.P. 23:

> "(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: * * *
>
> "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole * * *."

in the Advisory Committee's Note.[14] And the Note's emphasis on declaratory, injunctive relief is easily satisfied by Title VII. See §706 (g), 42 U.S.C.A. §2000e-5 (g).

Indeed, if class-wide relief were not afforded expressly in any injunction or declaratory order issued in Employee's behalf, the result would be the incongruous one of the Court — a Federal Court, no less —

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[14]"Subdivision (b) (2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

"Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts v. Flax*, 313 F.2d 284 (5th Cir., 1963); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), cert. denied, 377 U.S. 972 (1964); *Brunson v. Board of Trustees of School District No. 1, Clarendon Cty., S. C.*, 311 F.2d 107 (4th Cir. 1962), cert. denied 373 U.S. 933 (1963); *Green v. School Bd. of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd. v. Bush*, 242 F.2d 156 (5th Cir. 1957), cert. denied, 354 U.S. 921 (1957); *Mannings v. Board of Public Inst. of Hillsborough County, Fla.*, 277 F.2d 370 (5th Cir. 1960); *Northcross v. Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir. 1962), cert. denied, 370 U.S. 944 (1962); *Frasier v. Board of Trustees of Univ. of N.C.*, 134 F. Supp. 589 (M.D.N.C. 1955, 3-judge Court), aff'd, 350 U.S. 979 (1956). Subdivision (b) (2) is not limited to civil-rights cases * * * ." 39 F.R.D. 102 (1966).

itself being the instrument of racial discrimination, which brings to mind our rejection of like arguments and result in *Potts v. Flax*, 5 Cir., 1963, 313 F.2d 284, 289.[15]

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[15]In analyzing why there could be a solo representation in a school desegregation case we had this to say:

"Fifth, and perhaps most important, the relief to the class as it was sought and obtained was a good deal more than something merely appropriate. There is at least considerable doubt that relief confined to individual specified Negro children either could be granted or, if granted, could be so limited in its operative effect. By the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. Such a decree, of course, might name the successful plaintiff as the party not to be discriminated against. But that decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race against others. Cf. *Shelley v. Kraemer*, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161. Moreover, to require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the *class* discrimination proscribed by *Bush v. Orleans Parish School Board*, 5 Cir., 1962, 308 F.2d 491, 499, on rehearing 308 F.2d 503; see also *Ross v. Dyer*, 5 Cir., 1962, 312 F.2d 191."

In note 5, at 289 we pointed out:

"Additionally, as we have recently pointed out, a school segregation suit presents more than a claim of invidious discrimination to individuals by reason of a universal policy of segregation. It involves a discrimination against a *class* as a class, and this is assuredly appropriate for class relief. *Bush v. Orleans Parish School Board*, 5 Cir., 1962, 308 F.2d 491, 499, modified on rehearing, 308 F.2d 503. See also *Ross v. Dyer*, 5 Cir., 1962, 312 F.2d 191."

See also *Hall v. Werthan Bag Corporation*, M. D. Tenn., 1966, 251 F.Supp. 184, 186:

"If it exists, it applies throughout the class. * * * And

Any effort to distinguish *Oatis* as Employer's brief undertook to do respecting *Hall v. Werthan Bag Corp., supra*, on the ground that interventions were involved is unavailing. Amended Rules 19, 23, and 24 are meant to, and do, dovetail in many respects. *Atlantis Development Corp v. United States*, 5 Cir., 1967, 379 F.2d 818, 824-25. Meeting the test of the right to intervene, F.R.Civ.P. 24, intervention is actually superfluous if — and here there is no if, big or little — element (4) of 23 (a) on the adequacy of the representation of the class is satisfied.

The reason given by the Trial Court (see text at note 12, *supra*) requires only slight, if any, further answer. Basically it misconceives the purpose of the lawsuit. The Federal Judge — awesome as are his responsibilities and powers when invoked by a timely, proper (§§ 706 (e), (f) 42 U.S.C.A. §2000e-5 (e), (f)) suit — does not sit as a sort of high level industrial arbiter to determine whether employee X rather than Y should have a promotion. Relative competency and qualification, are involved, to be sure. But they are relevant in determining whether denial of the coveted promotion was motivated by unlawful discrimination of race, color, sex or national origin. This is the familiar problem in §8 (a) (3), 29 U.S.C.A. § 158 (a) (3) discharges in NLRB cases and, closer home, voter registration cases in which, of course, the class-action-sought-for voting right is the most highly personalized, individualized thing imaginable.

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whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class."

And finally, as *Oatis* makes clear in its reference to sub-classes, the Court under F.R.Civ.P. 23 has the duty, and ample powers, both in the conduct of the trial and relief granted to treat common things in common and to distinguish the distinguishable.

REVERSED AND REMANDED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25307

JOHN MARTIN OATIS, DAVID JOHNSON, SR., and R. T. YOUNG,

Appellants,

versus

CROWN ZELLERBACH CORPORATION, ET AL,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(July 16, 1968)

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

BELL, Circuit Judge: This appeal presents the issue whether membership in a class action brought under § 706(e) of the Civil Rights Act of 1964, 24 USCA, § 2000e-5(e), is restricted to individuals who have filed charges with the Equal Employment Opportunity Commission. The District Court answered in the affirmative. *Mondy v. Crown Zellerbach Corporation,* E.D. La.,

1967, 271 F.Supp. 258, 264-66. Being of the view that the class was unduly restricted, we reverse.

The suit giving rise to this issue was instituted on March 1, 1967 by four Negro employees (Hill, Oatis, Johnson and Young) of Crown Zellerbach Corporation. The suit was filed against the company and the two local unions representing employees at the Bogalusa, Louisiana plant of the company. Each plaintiff sued on behalf of himself and all present and prospective Negro employees of the plant, as a class, seeking injunctive relief against unfair employment practices as defined by Title VII of the Civil Rights Act of 1964, 42 USCA, §§ 2000e-2 and 3.

Prior to this action Hill filed a formal charge against the defendants with the Equal Employment Opportunity Commission (EEOC) in the manner provided for under § 706(a) of the Act, 42 USCA, § 2000e-5(a). The Commission informed Hill by letter that it had been unable to obtain voluntary compliance from appellees within the 60 days required by the Act. The suit was commenced two weeks later.

Crown and the unions filed motions to dismiss. They contended that an action under Title VII of the Act, 42 USCA, § 2000e et seq., cannot be brought on behalf of a class, and that in any event plaintiffs Oatis, Johnson and Young could not join in the action as co-plaintiffs inasmuch as they had not filed a charge with the EEOC. The Attorney General, representing the EEOC, was permitted to intervene. See § 706(e) of the Act, supra.

The District Court ruled that the action could be maintained as a class action, but that the class was limited to those Negro employees who had filed charges with EEOC pursuant to § 706 (a) of the Act. 271 F.Supp, supra, at pp. 264-66. Oatis, Johnson and Young had not filed such a charge and the motions to dismiss were granted as to them. It is from this dismissal that they appeal.[1]

Under the enforcement provisions of Title VII an aggrieved person is required to file a written charge with the EEOC. § 706(a), supra. Assuming the EEOC finds reasonable cause to believe the charge is true, informal efforts to settle with the employer or union are to be made through conference, conciliation, and persuasion.[2] The filing of such a charge is a condition

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[1]The express determination and direction required by Rule 54(b) F.R.Civ.P., in connection with the entry of judgment has been made and appeal is proper although the case is still pending as to Hill's complaint. See *Dore v. Link Belt Company,* 5 Cir., 1968, 391 F.2d 671.

[2]§ 706(a):

> Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred . . . that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization . . . with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . .

precedent to seeking judicial relief. See § 706(e).[3] It is thus clear that there is great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation.

The plaintiffs-appellants maintain that a class action will lie if at least one aggrieved person has filed a charge with the EEOC. Defendants, on the other hand, assert that the administrative, private remedy intent and purposes of the statute will be circumvented and avoided if only one person may follow the administrative route dictate of the Act and then sue on behalf of the other employees. This, they urge, would result in the courts displacing the EEOC role in fostering the purposes of the Act. Defendants also argue that the Act provides for protection of the rights of a class in that § 707(a), 42 USCA, § 2000e-6, envisions a suit by the Attorney General when he finds that a pattern or practice of discrimination exists. This provision, they say, militates against the position of plaintiffs.

The arguments of defendants are not persuasive for several reasons. A similar argument regarding a suit by the Attorney General was rejected by this court

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[3] § 706(e):

> If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . .

in a case brought under Title II of the Civil Rights Act of 1964. *Lance v. Plummer*, 5 Cir., 1965, 353 F.2d 585. We again reject it. The Act permits private suits and in nowise precludes the class action device.

Moreover, it does not appear that to allow a class action, within proper confines, would in any way frustrate the purpose of the Act that the settlement of grievances be first attempted through the office of the EEOC. It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful. The better approach would appear to be that once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated and we proceed to an examination of this view.

Plaintiff Hill raised several claims in the charge which he filed with the EEOC. One of these was that he was being discriminated against by the use of segregated locker rooms. Under the District Court's ruling Hill might bring suit and be placed in the white locker room. Other Negroes would have to wait until they could process their charges through EEOC before they could obtain the same relief from the same employer. We do not believe that Congress intended such a result from the application of Title VII. The class should not be so narrowly restricted. This conclusion is in line with several District Court decisions. See, for

example, *Hall v. Werthan Bag Co.*, M. D. Tenn., 251 F. Supp. 184; *Bowe v. Colgate Palmolive Co.*, S.D. Ind., 1967, 272 F.Supp. 332; *Moody v. Albemarle Paper Co.*, E.D. N.C., 1967, 271 F.Supp. 27, as those cases involve injunctive relief.

The Supreme Court recently made an apt comment on the nature of suits brought under the Civil Rights Act of 1964. See *Newman v. Piggie Park Enterprises*, 1968, _____ U.S. _____, 88 S.Ct. _____, 19 L.Ed.2d 1263, where the court stated:

> "A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone, but also as a 'private attorney general', vindicating a policy that Congress considered of the highest priority."

Clearly the same logic applies to Title VII of the Act. Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would tend to frustrate our system of justice and order.

We thus hold that a class action is permissible under Title VII of the Civil Rights Act of 1964 within the following limits. First, the class action must, as it does here, meet the requirements of Rule 23(a) and (b)

(2).[5] Next, the issues that may be raised by plaintiff in such a class action are those issues that he has standing to raise (i.e., the issues as to which he is aggrieved, see § 706(a), supra), and that he has raised in the charge filed with the EEOC pursuant to § 706(a). Here then the issues that may be considered in the suit are those properly asserted by Hill in the EEOC charge and as are reasserted in the complaint.

Additionally, it is not necessary that members of the class bring a charge with the EEOC as a prerequisite to joining as co-plaintiffs in the litigation. It is sufficient that they are in a class and assert the same or some of the issues. This emphasizes the reason for Oatis, Johnson and Young to appear as co-plaintiffs. They were each employed in a separate department of the plant. They were representative of their respective departments, as Hill was of his, in the

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[5]Rule 23, F.R.Civ.P.:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
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> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the case as a whole;

class action. They, as co-plaintiffs, must proceed, however, within the peripnery of the issues which Hill could assert. Under Rule 23(a) they would be representatives of the class consisting of the Negro employees in their departments so as to fairly and adequately protect their interests. This follows from the fact that due to the inapplicability of some of the issues to all members of the class, the proceeding might be facilitated by the use of subclasses. In such event one or more of the co-plaintiffs might represent a subclass. It was error, therefore, to dismiss appellants. They should have been permitted to remain in the case as plaintiffs but with their participation limited to the issues asserted by Hill.

REVERSED and REMANDED for further proceedings not inconsistent herewith.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.